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**Subject:** Microsoft Settlement

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#### Summary

The Revised Proposed Final Judgment (PFJ) in the case Civil Action No. 98-1232 (CKK), United States of America vs. Microsoft Corporation (defendant), and Civil Action No. 98-1233 (CKK) State of New York, ex. rel. vs. Microsoft Corporation, does not appear to achieve the mandate given in the decision of the United States Court of Appeals in Case No. 00-5212/00-5213, namely, "to 'unfetter a market from anticompetitive conduct,' ([a quote from] Ford Motor Co., 405 U.S. at 577), to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' [a quote from] United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968)."

The PFJ fails to meet the appeals court mandate in, at least, the three following areas:

1. The PFJ provides no effective enforcement mechanism.
2. The PFJ fails to address the free software movement.
3. The PFJ does not effectively prohibit anticompetitive pricing practices.

Therefore, this resolution is not in the public interest and should not be adopted without substantial revisions.

#### Discussion

##### 1. Enforcement

In his testimony before the United States Senate Committee on the Judiciary on December 12, 2001 (<http://judiciary.senate.gov/te121201f-lessig.htm>), Professor Lawrence

Lessig thoroughly discusses the failure of the PFJ to provide an effective enforcement mechanism. The lack of a "special master, or panel of masters" to resolve disagreements about application of the terms of the consent decree efficiently is a "fatal weakness". The duties and power of a special master are spelled out in detail in section N of "Plaintiff Litigating States' Remedial Proposal" ([http://www.naag.org/features/microsoft/ms-remedy\\_filing.pdf](http://www.naag.org/features/microsoft/ms-remedy_filing.pdf)). As Professor Lessig states, the personal computer field changes so rapidly that by the time matters are litigated in a traditional manner, the original complaint is usually moot.

Further, neither the special master nor the Technical Committee envisioned by the PFJ should be selected by, or under any financial obligation, to the defendant. They should be United States federal employees with their own staffs and offices. Finally, to insure that there are no conflicts of interest, the proceedings of the special master and/or technical committee must be open to public inspection, subject to the privacy of third parties bringing complaints under the PFJ.

## 2. Free Software

The PFJ gives the defendant too much scope to prevent disclosure of interoperability data to developers of competing software. For example, there are several operating systems which are capable of running on the same hardware as Windows Operating System Products, several of which are free software. (The nature of "free software" meant here is discussed in <http://www.gnu.org/philosophy/free-sw.html>.) However, the PFJ specifically states that the defendant does not have to reveal interoperability information to any entity which the defendant deems as not having a authentic and viable business (section III.J.2). This appears to be deliberate attempt to prevent free software implementations of Windows Operating System compatible products. Since many of these projects are entirely volunteer-based, there is no corporate entity which can be said to be a business.

Further, such intellectual property which the defendant is required to disclose will be available only under Reasonable and Non-Discriminatory licensing terms (section III.I.1). Free software developers cannot afford even the most modest licensing fees since there is no direct financial return on their work. Therefore, all documentation of APIs, Communication Protocols and other intellectual property made available to commercial entities must be made available on a royalty-free basis to free software developers.

## 3. Anticompetitive Pricing

The PFJ requires that the defendant publish a uniform schedule for

royalties on Windows Operating System Products. It then lists several exceptions whereby certain OEMs may be offered discounts, specifically that the top-most ten and next top-most ten licensees of Windows Operating System Products are granted special status (section III.B). Such differentiation will have a substantial, negative impact on small OEM computer businesses, so-called regional "white-box" (i.e., no brand name) vendors.

During the trial, it was observed that, over time, the cost of the Windows Operating System has been an increasing percentage of the cost of a personal computer. Therefore, even the most modest variations in the price of the operating system can make a substantial difference in the cost of a computer. Regional vendors who do not have access to the top twenty vendor discounts will face a substantial disadvantage selling low-cost systems. Further, since they are not "Covered OEMs", there appears to be no restraint on retaliation against these vendors for offering Non-Microsoft Operating Systems Products.

#### Conclusion

In spite of Attorney General John Ashcroft's statement that the Revised Proposed Final Judgment "completely addressed the anti-competitive conduct outlined by the Court of Appeals", the PFJ still allows exclusionary practices to continue. It does not effectively lower the barrier to entry of competitors into the operating systems market; instead, it strengthens the defendant's position by erecting new barriers whereby the defendant can determine who receives information necessary to produce interoperating or competing software. These areas must be addressed before the PFJ can be considered a suitable resolution to this case.

Sincerely,

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